

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

GEORGIA-PACIFIC CONSUMER PRODUCTS LP, et al,  
Plaintiff, No. 1:11cv483  
vs.  
NCR, INTERNATIONAL PAPER COMPANY,  
WEYERHAEUSER,  
Defendants.

Before:

THE HONORABLE HUGH BRENNEMAN, JR.,  
U.S. Magistrate Judge  
Grand Rapids, Michigan  
January 9, 2015  
Motion to Compel Discovery Proceedings

APPEARANCES:

MR. PETER A. SMIT  
Varnum Riddering Schmidt & Howlett  
333 Bridge Street, NW  
PO Box 352  
Grand Rapids, MI 49501-0352  
616-336-6000

MR. MICHAEL SHEBELSKIE  
Hunton & Williams LLP  
Riverfront Plaza, East Tower  
951 E. Byrd Street  
Richmond, VA 23219  
804-788-8262

On behalf of the Plaintiff;

1 MR. GEOFFREY A. FIELDS  
2 Dickinson Wright PLLC  
3 200 Ottawa Avenue NW  
4 Suite 900  
Grand Rapids, MI 49503  
616-458-1300

5 On behalf of the Defendant NCR,

6 MR. JOHN DANIEL PARKER  
7 Baker & Hostetler LLP  
8 PNC Center  
1900 E. Ninth Street  
Cleveland, OH 44114-3485  
216-861-7610

9 On behalf of the Defendant IP.

10 MR. SCOTT MICHAEL WATSON  
11 Warner Norcross & Judd  
12 111 Lyon Street, NW  
Suite 900  
Grand Rapids, MI 49503  
616-752-2465

13 On behalf of the Defendant Weyerhaeuser.

14 MR. ANDREW C. HANSON  
15 Environmental Enforcement Section  
16 U.S. Department of Justice  
PO Box 7611  
17 Washington, D.C. 20044-7611

18  
19  
20 TRANSCRIBED BY: MS. KATHY J. ANDERSON, RPR, FCRR  
21  
22  
23  
24  
25

January 9, 2015

PROCEEDINGS, 9:37 a.m.

THE COURT: Good to see all of you. We have an alarm system in our court that -- well, it's a system that tells us if the court is going to be closed or not. It doesn't call us every day, obviously, it calls us when the court is going to be closed. You get a telephone, automatic telephone system. It wakes you up at some ungodly hour to tell you that the court is going to be closed. It goes to the telephone, it goes to your cell phone until it finally makes contact with you, and it's an automatic dialing system. And so, sure enough, it woke us all up this morning, and goes through the normal litany of the information. At the end it says, and in conclusion, the court will be open. Well, thank you for that. You roll over and go back to sleep.

Well, I wouldn't have it any other way. I read with great interest the briefs in this motion, which is being brought by Georgia-Pacific to compel the Environmental Protection Agency to respond to a subpoena, and the parties have postured this in such a way that, again, by the technicalities of whether or not the subpoena has been properly served and so forth so that we can get to the issue of whether or not the EPA ought to be held to respond on the, more or less on the merits.

I notice we have more people here than I anticipated.

1 Which is fine. I don't know if all of you have a dog in this  
2 fight, and whether you want to participate by way of argument;  
3 you're all welcome to. Or if you simply like blood sport. Why  
4 you want to come up in this weather if you didn't have to, I  
5 really have no idea. Anybody that wants to participate is more  
6 than welcome to. We will start with Georgia-Pacific since that  
7 company is the one that brought the motion. Counsel.

8 MR. SHEBELSKIE: Thank you, Your Honor. Good morning.

9 THE COURT: Good morning. We do have a couple hours  
10 to do this. Shortly before 12:00 o'clock I do have to recess  
11 but we can always pick it up this afternoon of course if we  
12 really had to.

13 MR. SHEBELSKIE: Your Honor, my name is  
14 Mike Shebelskie. I'm with Hunton Williams, along with  
15 Peter Smit; we represent Georgia-Pacific in this matter.

16 As Your Honor states, the motion today is a motion to  
17 compel the EPA to produce a witness for a 30(b)(6) deposition  
18 on various topics. The EPA has objected and refused to produce  
19 a witness in response to any of the topics, thus necessitating  
20 our motion here today.

21 As an initial matter, I would like to make a point  
22 which I think is not controverted by the EPA, which is that the  
23 EPA is in fact subject to the Federal Rules of Civil Procedure,  
24 including specifically Rule 30, and Rule 45.

25 Rule 30 of course provides that a party in federal, in

1 a federal lawsuit may take the deposition of any person, and it  
2 goes on in particular respect to 30(b)(6) to say that a notice  
3 of deposition on a juridical entity can be addressed to any  
4 corporation, association, and including governmental body. And  
5 so clearly Rule 30 has no limitation that carves out federal  
6 agencies from its scope.

7 And in addition, Rule 30 provides that it can be  
8 enforced through a Rule 45 subpoena, and Rule 45, then like  
9 Rule 30, is unqualified. It provides that, "Any person can be  
10 compelled to attend the deposition by a subpoena." Rule 45  
11 does not carve out federal agencies, and the case law has been  
12 very consistent. The seminal case on this I believe is the, if  
13 I pronounce it correctly, the Yousuf decision from the D.C.  
14 Circuit acknowledging that federal agencies are in fact persons  
15 within the meaning of Rule 45.

16 So in addition, Your Honor, to the subpoena being  
17 properly served or at least -- and there is no controversy on  
18 that -- I think there's also no dispute that the EPA is subject  
19 to the subpoena. Rather, the issue goes more to EPA's  
20 objection perhaps to relevance, although I'm not so sure their  
21 arguments are, that's their primary argument, but more one to  
22 whether the EPA gets to override this Court's authority and  
23 decide whether or not the subpoena presents an undue burden.  
24 And whether it has to comply or not.

25 And obviously it comes as no surprise that our view is

1       that the EPA doesn't have that authority and that the Court  
2       gets to decide whether or not in applying the normal rules that  
3       apply in federal civil discovery, whether or not discovery is  
4       appropriate.

5               THE COURT: Well, they are looking at the  
6       Administrative Procedures Act as the method by which or the  
7       Court ought to determine whether they should comply with this  
8       subpoena, are they not?

9               MR. SHEBELSKIE: They are indeed, Your Honor. And I  
10      think really the Court needs to look no further than Judge  
11      Scoville's opinion on this topic from just last year, or 2013,  
12      just a little over a year ago in the case of Gardner versus  
13      Michigan State University.

14              It is cited in our brief. It's a September 2013  
15      opinion, and it's cited at 2013 Westlaw 53202 A 2.

16              Judge Scoville analyzes the case law and his ultimate  
17      conclusion is that the Administrative Procedures Act does not  
18      govern the standard of review the Court is to apply in deciding  
19      the propriety of a Rule 45 deposition subpoena on a federal  
20      agency. There it was the Bureau of Prisons of Indian Affairs,  
21      but the issue was the same.

22              What Judge Scoville goes through, his analysis in that  
23      opinion notes that in a handful of cases, primarily from the  
24      1990s, as he writes, that the agencies, federal agencies had  
25      some success, and I'm quoting here from the opinion, "...in

1       persuading federal courts that a proceeding under the APA, and  
2       the APA's arbitrary and capricious standard of review was the  
3       only avenue of relief, even in federal court with respect to a  
4       federal subpoena."

5               Judge Scoville notes that Judge Borman in the Eastern  
6       District of Michigan had recently analyzed the case law and  
7       concluded that really that was an inappropriate ruling, that  
8       really Rule 45 should govern, and more importantly, concluded  
9       that the Sixth Circuit would reach that conclusion.

10              The seminal case from the Sixth Circuit is the Bankers  
11       Trust opinion, also cited in our brief that appears at 61 F.3d  
12       465. And what Judge Borman in the Eastern District and Judge  
13       Scoville here concluded in looking at the Sixth Circuit's  
14       opinion in Bankers Trust is that the Court of Appeals in that  
15       decision held that an agency -- that the statutory authorities  
16       allowing an agency to promulgate its housekeeping regulations,  
17       "simply do not give it the power to promulgate regulations in  
18       direct contravention of the Federal Rules of Civil Procedure."

19              And then Judge Scoville goes on to say, conclude then  
20       that, "The APA standard does not govern the propriety of a Rule  
21       45 subpoena."

22              So really, Judge Scoville has I think answered this  
23       question because really, Your Honor, the D.C. Circuit, which is  
24       no stranger to administrative law proceedings is quite clear on  
25       this, that the APA standard does not govern the review of a

1 Rule 45 subpoena.

2 And indeed, and the Ninth Circuit follows suit as  
3 well.

4 THE COURT: The Ninth Circuit and the D.C. Circuit  
5 agree?

6 MR. SHEBELSKIE: Yes, sir. Believe it or not. And  
7 the Sixth Circuit I think really in Bankers Trust is in  
8 agreement as well, and certainly two of your fellow judges here  
9 in Michigan so interpret that opinion.

10 And really, Judge, when you look at the case law that  
11 the EPA is citing for what they say is the contrary holding,  
12 they cite, 1, 2, 3, 4, 5, 6 opinions from different circuits.  
13 The context of those are very important. Some of them involve  
14 subpoenas issued by state courts against federal agencies. And  
15 either the agency removed the subpoena, the motion to compel  
16 the subpoena to federal court, but on removal the district  
17 court's jurisdiction is derivative of the state court's  
18 jurisdiction and therefore it does not have authority to issue  
19 a subpoena, a state court doesn't have authority to issue the  
20 subpoena against the federal agency and therefore the APA could  
21 only be the governing standard. In other cases, two other  
22 cases at least the proceedings were not brought up as motions  
23 to compel Rule 45 subpoena, but rather were original APA  
24 actions. A person made a voluntary request for information in  
25 one case, the agency denied it, the request, and the requester



1 then files an original action in federal court under the APA.  
2 Obviously framing the issue under the APA as their complaint,  
3 the APA governs their standard.

4 And then yet in one other case the subpoena at issue  
5 was one issued by an arbitrator, and the question was whether  
6 it's enforceable by the FAA.

7 And so really I think two of their opinions at the end  
8 of the day really deal with Rule 45 subpoenas. That's the one  
9 from the Second Circuit that they cite, the General Electric  
10 case.

11 THE COURT: General Electric?

12 MR. SHEBELSKIE: General Electric, yes, sir. And the  
13 Moore opinion from the Eleventh Circuit. So really the  
14 suggestion that there is this overwhelming body of circuit  
15 court case law applying the APA standard to a Rule 45 subpoena  
16 I think dramatically overstates the case; and really the  
17 lineup, Your Honor, is you have the D.C. Circuit, the Ninth  
18 Circuit, and I would say the Sixth Circuit concluding that Rule  
19 45 standards apply, and the Second Circuit and the Eleventh  
20 Circuit clearly saying to the contrary, and the other circuits  
21 making the statements in very different procedural context.

22 And ultimately, Your Honor, I think the reason why the  
23 Sixth Circuit ruled the D.C. Circuit rule is correct is because  
24 both the statute upon which the agency is relying here, and  
25 their regulations don't give them the authority that they are

1 maintaining here with respect to this subpoena.

2 The statutory basis for the regulation that provides  
3 the EPA's claim here for an arbitrary and capricious standard  
4 is the Housekeeping Statute that appears at 5 U.S. Code  
5 Section 301. Your Honor, I have a copy of that I can hand up  
6 to the Court if that would be of assistance.

7 THE COURT: That would be fine.

8 MR. SHEBELSKIE: It includes a couple of other  
9 attachments. I have an extra copy for the Court as well.

10 THE COURT: That would be fine. Thank you.

11 MR. SHEBELSKIE: The pages aren't numbered -- there  
12 is a transcript that appears and after the transcript the blue  
13 page after that is a copy of U.S. Code Section 301, which is  
14 the housekeeping, a statute upon which the government bases the  
15 regulations in their claim for authority here.

16 And the first part of the statute has two sentences;  
17 the first sentence is the sort of substantive provision that is  
18 the housekeeping regulation. Basically it is a grant to the  
19 agencies to promulgate regulations to order their internal  
20 affairs. It actually dates back apparently to the George  
21 Washington administration when the first cabinets were being  
22 set up.

23 But really what is of importance is that second  
24 sentence. This was added in 1958, I believe, it was, after the  
25 Supreme Court's decision in Touhy that's discussed in the

1       brief. Touhy had held that under the housekeeping regulations  
2       an EPA employee could not be held in contempt for not appearing  
3       at a deposition for a subpoena issued directly on that  
4       individual employee. Wasn't a 30(b)(6) situation. And the  
5       Supreme Court said that the housekeeping regulation certainly  
6       was a justification for the employee not to appear and  
7       therefore his conduct could not be considered can contumacious.

8               Subsequent to that opinion agencies began to take the  
9       view then that these housekeeping regulations allowed them to  
10      withhold information going beyond really what Touhy had held.  
11      Congress responded to that by passing the amendment 301 and  
12      added this sentence which provides specifically, "This section  
13      does not authorize withholding information from the public or  
14      limiting the availability of records to the public."

15             And the case law in the Ninth Circuit, in the D.C.  
16      Circuit, points out that statutory amendment, specifically in  
17      the legislative history concerning it, and they explain that  
18      the Congress expressly said in adopting this, they wanted to  
19      make clear that these housekeeping regulations cannot provide a  
20      basis ultimately for an agency to withhold information. Sure,  
21      they can adopt regulations that will say individual employees  
22      of an agency don't get to independently decide whether to  
23      respond to a subpoena, either to appear at a deposition or to  
24      produce documents, but that the agency can centralize the  
25      decision making process and make sure that the agency speaks in

1 a considered way with one voice in deciding what the agency's  
2 response to the subpoena will be. But that's all that is.  
3 That's an internal housekeeping matter that regulates how the  
4 agency will decide how it will respond to a subpoena. But it  
5 cannot, particularly in light of the statutory add-on to the  
6 statute, authorize an agency to withhold information and  
7 certainly not authorize them to be the arbiter of that decision  
8 and to require courts to defer to their decisions under an  
9 arbitrary and capricious standard.

10 In addition, Your Honor, even the regulations that the  
11 EPA has promulgated under that statute, and that they cite here  
12 don't give them that authority with respect to this issue.  
13 Your Honor, the regulations that are cited by the agency are  
14 also included in this handout I've given you today and they  
15 follow the blue page after the statute.

16 And you can see from there the initial regulation  
17 section, 2.401 under Scope and Purpose, it provides that this  
18 subpart sets forth procedures to be followed when an EPA  
19 employee is requested or subpoenaed to provide testimony  
20 concerning information acquired in the course of performing his  
21 official duties, et cetera. And then it goes on in the ensuing  
22 provisions to say what the employee is supposed to do, namely,  
23 give notice to certain officials within the agency, and then  
24 rely and take direction from those officials on whether or not  
25 to comply with the subpoena or not.

1           These regulations on their face, Your Honor, do not,  
2           first of all, concern a Rule 30(b)(6) notice of deposition on  
3           the agency as an agency, as a governmental body under Rule  
4           30(b)(6). These concern subpoenas directed individually to  
5           agency employees. So on its face these regulations don't  
6           apply, and certainly nothing in these regulations direct that  
7           somehow the agency is asserting authority in a 30(b)(6) context  
8           on a subpoena, deposition subpoena directed to the agency  
9           itself.

10           THE COURT: You're relying on the -- I don't mean to  
11           interrupt you. For clarification, you're relying upon the  
12           first sentence of 2.401 when you say that?

13           MR. SHEBELSKIE: Yes, sir.

14           THE COURT: Okay.

15           MR. SHEBELSKIE: And you'll see throughout the ensuing  
16           sections, 2.402 and 2.403, these are the policies and  
17           procedures sections but it's all referring to EPA employees.  
18           And 2.404 in fact is entitled, Procedures When an Employee is  
19           Subpoenaed. 2.405 and 06 concern subpoenas for documents,  
20           which aren't at issue here.

21           THE COURT: Which regulations do you understand the  
22           EPA is pointing to as having relied upon to process your  
23           request? Because you are proceeding under a 30(b)(6) request  
24           to the agency itself, as I understand it.

25           MR. SHEBELSKIE: Yes, sir. Exactly right. And in

1        their brief, the EPA cites to these regulations here in subpart  
2        C starting at 2.401, and continuing to 2.406. I believe they  
3        even cite 2.406 in their brief. So it's, it's that, those six  
4        particular regulations that they are relying on, and really  
5        none of them address a 30(b)(6) notice and none of them  
6        provide, the agency will not respond and can withhold  
7        compliance with a 30(b)(6) notice, nor could it in any event  
8        under even the Section 301, the Housekeeping Statute. And so  
9        even if the agency here was trying to assert that in response  
10       to a 30(b)(6) notice these regulations or any other regulations  
11       that it might now point to authorize it to withhold information  
12       under Rule 45 subpoena seeking a 30(b)(6) deposition, the  
13       Housekeeping Statute actually prohibits that, and any such  
14       regulation and assertion of authority by the agency would,  
15       would be unlawful.

16                So really, Your Honor, it's for those reasons that  
17       Rule 45, we think the normal standards under Rule 45 apply  
18       here, and I don't think there's any question that the EPA  
19       possesses relevant and certainly discoverable information  
20       relevant to this matter, and I can go into that in just in  
21       short order here, Your Honor.

22                The front page of the handout that I gave you includes  
23       Schedule A for the 30(b)(6) notice on the amended deposition  
24       notice this was included with our brief this copy I have here  
25       just for convenience. And you can see there are 12 topics.

1 It's not a long, not extensive number of topics. They are very  
2 discreet. They are concise. And they are certainly all  
3 relevant to the issues here.

4 And in particular, Your Honor, I really would like to  
5 direct your attention to the topics that start with number 6.  
6 And --

7 THE COURT: I would like to go through these topics  
8 with you, and I want to go through them with the EPA as well.

9 MR. SHEBELSKIE: Well --

10 THE COURT: Go through them systematically.

11 MR. SHEBELSKIE: We can go through them  
12 systematically, but, Your Honor, as we have been working  
13 through this briefing on the issue, and obviously discovery has  
14 been going on as well, as you well know, on other topics, I  
15 think in fairness, as I read the EPA's brief, they say topics 1  
16 through 5 are matters of public record and can be found in the  
17 documents, and in large measure, I think that they are right.  
18 I would agree with that. And we also have, around -- was a  
19 day or two right before we filed the brief, took the deposition  
20 of the Missouri (sic) Department of Environmental Quality, and  
21 that deposition concluded I think the day after this brief was  
22 filed. And I think in fairness, topics 1 through 5 have been  
23 covered in that deposition for sure, and from Georgia-Pacific's  
24 perspective at least, we're satisfied with what we got in that  
25 deposition on those topics. I don't know if the other parties

1 might have a different view on that. So --

2 THE COURT: Has NCR also served a notice of a 30(b)(6)  
3 deposition on the EPA?

4 MR. SHEBELSKIE: No, it did not. NCR served a notice  
5 of deposition on an individual EPA employee, Mr. James Saric.  
6 We did too. But we also served a 30(b)(6) notice and have  
7 opted just to proceed with respect to the latter notice.

8 THE COURT: You're not pursuing the individual EPA  
9 official.

10 MR. SHEBELSKIE: That is correct, we are not. And  
11 neither of the other parties has served any notice of  
12 deposition on EPA or any employee.

13 THE COURT: They could appear at this 30(b)(6)  
14 deposition of the EPA and ask questions?

15 MR. SHEBELSKIE: Yes, they could, of course. We would  
16 ask first and they can conduct cross-examination, right. And  
17 obviously the deposition is constrained by the general rule in  
18 I think it's in 30 about the seven-hour limit. So we are not  
19 talking about a deposition that's going to go on for days and  
20 days and days. We know we have a discreet period. And I would  
21 add, Your Honor, we did notice a 30(b)(6) deposition of the  
22 Missouri (sic) Department of Environmental Quality --  
23 Missouri. I'm thinking of my Super Fund dioxin litigation in  
24 Times Beach. The Michigan Department of Environmental Quality,  
25 and Georgia-Pacific's 30(b)(6) deposition of the Michigan



1 agency didn't really go beyond three hours. So --

2 THE COURT: I was beginning to wonder how Missouri was  
3 involved.

4 MR. SHEBELSKIE: I wish you had spoken up sooner.

5 THE COURT: I didn't want to express my ignorance  
6 either.

7 MR. SHEBELSKIE: So that's why I say, Your Honor, from  
8 our, from Georgia-Pacific's perspective, we can withdraw topics  
9 1 through 5. The other defendants might have an independent  
10 view on that, and so that's why I was starting with number 6.  
11 I can talk about 1 through 5 if you still want me to.

12 THE COURT: Well, procedurally, you filed the 30(b)(6)  
13 notice, the other parties would of course like to participate.  
14 Do they have any right to rely upon your notice and could they  
15 now claim if you withdraw your topics 1 through 5 that they  
16 have been somehow blind sided and that they have somehow  
17 obtained some right to depose EPA on topics 1 through 5?

18 MR. SHEBELSKIE: I wouldn't think so, Your Honor.

19 THE COURT: I'm just curious. So you're withdrawing 1  
20 through 5.

21 MR. SHEBELSKIE: Yes, from our perspective, and if  
22 that is defendant inclusive, that's fine with us.

23 THE COURT: All right.

24 MR. SHEBELSKIE: Because I think -- because again,  
25 our interest is not to unduly burden the EPA or to take a

1       pointless deposition on topics that we have already established  
2       through the Michigan Department of Environmental Quality. But  
3       rather it is to take discovery of matters that we really do  
4       need discovery of. And so we are mindful of that obligation,  
5       both to the court and to the agency, and to the other parties  
6       too, not to waste people's time and money.

7               Proceeding then to number 6. This topic as you see is  
8       very discreet. It's very rifle shot. It's, EPA's reasons for  
9       concluding that the removal actions at the Plainwell  
10      Impoundment and Plainwell Dam Number 2 Impoundment that were  
11      directed by the 2007 Administrative Settlement Agreements and  
12      Order between EPA and various parties, including  
13      Georgia-Pacific, were time-critical. That's very discreet.  
14      One can argue that's overbroad. And here's why it's relevant,  
15      Your Honor.

16             The Phase II trial that we have upcoming later this  
17      year generally concerns allocation responsibility for past and  
18      future costs incurred in connection at this Super Fund site.  
19      Some of the past costs, a significant amount of the past costs  
20      include work that Georgia-Pacific undertook and paid for to do  
21      cleanup activities behind two basically dams in the river in  
22      the Plainwell area. And one of the requirements for recovery  
23      of those funds from the defendants here is whether or not those  
24      expenditures were consistent with the National Contingency  
25      Plan, NCP you'll see reference to. So that's an issue in the

1 case. And this cleanup work at these two dams were done on  
2 what's called a time critical removal basis. It's done sort of  
3 basically on an accelerated basis. Here the agencies have not  
4 finalized their review of the site and made a record of  
5 decision of what the ultimate cleanup activity would be. But  
6 in these two particular locations back in the day, a couple  
7 years ago, they concluded that these two particular sites  
8 presented basically special hazards with the heavy  
9 concentrations of PCBs and needed to be cleaned up right away  
10 on a time critical basis, basically sort of accelerating the  
11 cleanup even though the main decision making process was going  
12 on. That's what time critical here means.

13 And there are separate procedures and processes that  
14 agencies and Georgia-Pacific and the other parties engage in  
15 under the regulations to decide whether or not to proceed on a  
16 time critical basis for certain costs.

17 Well, NCR has challenged the reasonableness of the  
18 expenses that Georgia-Pacific incurred to clean up, to do this  
19 time critical work behind the Plainwell Impoundments. And we  
20 included with their -- with our brief as an example of this  
21 NCR's answers to our interrogatories asking them to explain,  
22 identify which of our costs they think are not consistent with  
23 the National Contingency Plan, and that's the second attachment  
24 in the handout that I gave you. It was attached to our brief.  
25 That is the excerpt from NCR's interrogatory answer concerning

1 our past costs and consistency with the National Contingency  
2 Plan. And on the second page of that interrogatory answer in  
3 the handout is page 5 of the excerpt. In the second, the third  
4 bullet point there, NCR says that the, costs Georgia-Pacific  
5 has allegedly incurred with respect to three purported time  
6 critical removal actions at the Plainwell Dam Number 2, former  
7 GP site, "were not incurred consistent with the NCP. These  
8 actions, although described as TCRAs, should have been subject  
9 to the NCP requirements for non-time-critical removal actions."  
10 Basically they shouldn't have been fast tracked. They should  
11 have been kept on the normal process like the rest of the site  
12 or the river portions of the site. And then NCR goes on to say  
13 that, "Georgia-Pacific worked with the EPA and the Michigan  
14 Department of Environmental Quality to treat these actions as  
15 TCRAs to avoid the procedural requirements of the NCP for  
16 non-time-critical removal action or remedial action."

17 In other words, Your Honor, NCR is maintaining that  
18 the characterization and treatment of this work as time  
19 critical removal actions is basically a sham. That EPA and  
20 Georgia-Pacific and the State Department of Environmental  
21 Quality basically colluded together to do this work erroneously  
22 and misleadingly characterize it as time critical in order for  
23 some purpose, unstated. But in any event, NCR says that that  
24 collusion and improper treatment as a time critical action is  
25 something that bars Georgia-Pacific from recovering those

1 costs. So certainly this is a relevant topic, appropriate for  
2 discovery.

3 This is a contention raised by one of the defendants  
4 in this action, and Georgia-Pacific under Rule 26 clearly needs  
5 to take discovery of this to explore with EPA, which was the  
6 lead agency in 2009, as to whether or not there was any  
7 improper action, communications, and decision making to treat  
8 this as noncritical action.

9 And even though, yes, there's a record of decision,  
10 there is agency action, administrative record that says it's a  
11 time critical action, the point is NCR is saying behind the  
12 scenes EPA didn't think it was time critical and work with  
13 Georgia-Pacific. So this is something that's clearly relevant  
14 and is something that cannot be ascertained from the public  
15 record because it concerns something that NCR asserts is going  
16 behind the public record.

17 THE COURT: So you have the reasons for that on a  
18 record, but you would want to inquire about whether there were  
19 any other communications outside of the record and, if so, what  
20 they were.

21 MR. SHEBELSKIE: Exactly, Your Honor. And more  
22 specifically, or as an addition to that specifically, that  
23 Georgia-Pacific and EPA did not in some way in dealing with  
24 communicating between themselves understand and appreciate  
25 these were not time critical reaction, cleanup actions but

1       nonetheless proceeded to characterize them that way and  
2       proceed.

3               THE COURT: Well, we have two entities which are --  
4       well, they are entities that operate through individuals or  
5       through human beings, so the entities themselves don't do  
6       anything. They only do what the people that act in their name  
7       do. So that can be found out by looking at the communications  
8       of the people involved in the transactions. Although I suppose  
9       you could also probe the minds of the people making the  
10      decisions and ask them did you label this as A. when it was  
11      really B. and thereby cause it to be treated as A. when it was  
12      really a B. situation. That's the only way you can really  
13      determine if an organization has characterized something as  
14      something it was not.

15             MR. SHEBELSKIE: Or in addition, Your Honor, whether  
16      there were any meetings, or discussions in person that aren't  
17      reflected in the administrative record.

18             THE COURT: Those would be matters of fact.

19             MR. SHEBELSKIE: Those are matters of fact. And  
20      that's what we would seek to explore. Certainly the agency has  
21      stated its official position in the administrative record as  
22      its belief that these were time critical reactions, time  
23      critical response actions that needed to be done. But NCR is  
24      suggesting that there was somehow something improper about that  
25      process, and some other communications and understandings

1       between EPA and Georgia-Pacific working together to so  
2       characterize the work as time critical when in fact it wasn't.

3               And if NCR is entitled to make this argument at trial,  
4       and it may well be that we succeed in having the Court exclude  
5       that contention as an improper collateral attack on the  
6       agency's decision making process, but it's been raised in  
7       discovery now; we need to arm ourselves with rebuttal testimony  
8       in the event that NCR is allowed to make this challenge.

9               So that's topic 6, Your Honor.

10              Topic 7, again, is discreet. It's whether, what are  
11       "EPA's present expectations regarding the need for future  
12       removal or remedial actions at the Site." And here's why  
13       that's relevant to this proceeding.

14              International Paper last year filed a motion with the  
15       court arguing that the Phase II proceeding should be bifurcated  
16       and should only cover past costs that Georgia-Pacific has  
17       incurred and not future costs. And that in fact the court  
18       doesn't have jurisdiction to decide in this proceeding any  
19       issue regarding future costs because, amongst other reasons,  
20       there is no final decision made about future cleanup costs, and  
21       therefore, the Court doesn't have jurisdiction to decide  
22       anything about that.

23              Judge Jonker denied that motion in part --

24              THE COURT: Sorry, who made the motion?

25              MR. SHEBELSKIE: International Paper. He denied that

1 motion to bifurcate but carried over the issue for decision  
2 later in connection with Phase II.

3 And so we have an issue Georgia-Pacific has to  
4 ultimately still respond to in this lawsuit, is to show that  
5 the Court has jurisdiction to decide future costs; and one of  
6 the ways of establishing that, as the case law directs, is to  
7 show that there is a reasonable likelihood that future costs  
8 will be incurred. Certainly having the view of EPA as to what  
9 it's doing now and its expectation as to whether or not some  
10 type of future costs will be incurred is something that we need  
11 to, and are entitled to, obtain as a fact matter to respond to  
12 that jurisdictional challenge that International Paper has  
13 raised. This is, this does not require us to establish that  
14 the EPA has made a decision as to what the future costs will be  
15 or future remedial actions specifically will be, but rather an  
16 understanding of the agency's view that, yes, future costs are  
17 reasonable and they are likely to be expected.

18 So that's topic 7.

19 THE COURT: Isn't EPA going to argue that you're  
20 treading on their internal decision making, that they haven't  
21 made these decisions yet, and that this is something that is  
22 probing beyond what is available to the public?

23 MR. SHEBELSKIE: No. Well, no, they shouldn't say  
24 that. And of course the rule provides the approach on, at a  
25 deal with that if the questioning bleeds over into that. Like



1 any privileged matter, what the Federal Rules of Civil  
2 Procedure provide, again, I think it's in Rule 30, that if a  
3 deponent is asked a question that impinges upon a proper  
4 privilege, the witness can be instructed not to answer, and if  
5 the examiner believes that the assertion of privilege was ill  
6 advised, that that can be the subject of a subsequent motion.  
7 Happens all the time when attorneys happen to be deposed. The  
8 fact that questions might be imagined that could impinge upon  
9 attorney-client privileges or work product privileges might  
10 come up in the deposition; that is not grounds for quashing the  
11 deposition in its entirety. But rather the courts uniformly  
12 and consistently say that the deposition goes forward. And in  
13 response to specific questions that fairly impinge upon the  
14 privilege, an objection will be made, and that's how the issue  
15 is teed up.

16 It's overly broad for EPA to say, well, there is a  
17 potential for impingement on the deliberative process privilege  
18 and therefore quash the deposition in its entirety.

19 I think it's fair to say, Your Honor, despite the many  
20 motions that have been filed in discovery in this case, no one  
21 has ever brought a motion against Georgia-Pacific saying that  
22 our questions in depositions were abusive, overbearing, went  
23 beyond the bounds of proper discovery or impinged upon  
24 privilege. I guess evidenced here by our ability to withdraw  
25 topics 1 through 5, we, we try to be very professional about

1 this and not waste people's time and ask things that are just  
2 going to be pointless questions because they will be  
3 privileged.

4 Your Honor, then turning to questions 8 and 9 I would  
5 like to put together because they are related, as it turns out,  
6 in the context of this case. 8 concerns "EPA's process for  
7 reviewing and approving deliverables submitted by PRPs pursuant  
8 to their various administrative orders and consents, and EPA's  
9 reasons for assuming responsibility as lead agency at the  
10 Site."

11 Now, again, these are very discreet topics. I don't  
12 think anyone can fairly say they are overly broad. And let me  
13 explain the context for them and why they are relevant to this  
14 case.

15 A little history here. EPA designated the Kalamazoo  
16 River site as a Super Fund site in 1990. The Michigan  
17 Department of Environmental Quality at that time was named as  
18 the lead agency for the site, and EPA still stayed involved.  
19 They had to approve all the work product, and that was the way  
20 the site was administered for ten years or so. And then around  
21 2000 EPA replaced the state department as the lead agency.

22 Now, NCR has taken the deposition of the project  
23 manager for the Missouri -- Michigan Department of  
24 Environmental Quality.

25 THE COURT: Kalamazoo River still remains pretty far

1 north.

2 MR. SHEBELSKIE: They deposed the project manager for  
3 the state department for those ten years and went into great  
4 detail with him about the what's called the deliverables that  
5 Georgia-Pacific and the other members of its cleanup group  
6 performed under the site in those ten years. Deliverables if  
7 you think about it basically are just reports and analyses.  
8 You have a whole series of analyses and feasibility studies,  
9 investigative studies that have to take place pursuant to these  
10 CERCLA regulations and process. And then that results in a  
11 recommendation of feasibility studies, and options and what to  
12 do, and then the agencies rely on that information and make a  
13 decision on a course of action.

14 And so over that ten-year period Georgia-Pacific  
15 worked with the State Department of Environmental Quality and  
16 the EPA in conducting investigations at the site, preparing  
17 analyses and reports, and feasibility studies, and the like.

18 Now, NCR elicited from the Michigan project manager  
19 for that period a searing critique in his opinion of the  
20 deliverables that Georgia-Pacific provided during that ten-year  
21 period. And that's -- and I have included the pertinent  
22 extracts from his deposition testimony with the package here,  
23 and I've highlighted the relevant testimony. But in sum, Your  
24 Honor, what the witness went through and related was he says,  
25 the Michigan Department of Environmental Quality and the EPA

1        were very concerned about Georgia-Pacific and were concerned  
2        about Georgia-Pacific's bona fides in doing the work. He goes  
3        on to relate how both the state department and EPA supposedly  
4        thought that Georgia-Pacific was deliberately foot dragging in  
5        preparing all these reports, that Georgia-Pacific allegedly was  
6        trying to doctor the reports. He says, put spin in the reports  
7        to favor Georgia-Pacific as opposed to what he viewed as a fair  
8        and objective presentation of the science. That EPA and the  
9        state department didn't trust Georgia-Pacific's contractor, it  
10       goes by the acronym BB&L, you'll see in here, and that they  
11       thought that Georgia-Pacific was ultimately foot dragging on  
12       preparing the feasibility studies because it deferred  
13       Georgia-Pacific having to incur costs for cleaning up the  
14       project. And, for example --

15                THE COURT: I apologize. But who prepared this  
16       report?

17                MR. SHEBELSKIE: Georgia-Pacific through its  
18       contractor at the site, BB&L. And these reports that are at  
19       issue here, this ten-year period --

20                THE COURT: Criticizing the report, not  
21       Georgia-Pacific.

22                MR. SHEBELSKIE: Oh, no. He is criticizing the  
23       process, the entirety of how Georgia-Pacific through --  
24       Georgia-Pacific he talks about specifically as well as its  
25       contractor; he says Georgia-Pacific is telling the contractor

1        what to put in the reports, Georgia-Pacific is dragging out the  
2        preparation of the reports.

3                THE COURT:    Who is he?

4                MR. SHEBELSKIE:    Oh, I'm sorry.    The witness,  
5        Mr. Scott Cornelius, the project manager for the State  
6        Department of Environmental Quality.    And he's not confining  
7        his testimony to just the state department, but also EPA.    He  
8        is expressing the views, he says, that EPA shared these views.  
9        And he will, for example, and it culminates up at page 180 of  
10       his testimony where he's asked, "And did MDEQ and EPA come to  
11       believe that the delay was directly associated with the desire  
12       of the PRPs to avoid those costs, to avoid the cost of cleaning  
13       up the river?"    And his answer is, "Yes, they did."    Again,  
14       referring to both the state and the EPA.

15               And then it continues to go on on page 204 with  
16       regards to EPA becoming the lead agency and supplanting the  
17       state in that, Mr. Cornelius says that EPA was asked, did that  
18       happen.    "Did EPA's taking over the site happen because EPA was  
19       perceived to have more fire power to compel cooperation?"    And  
20       his answer is, "Yes."

21               And so, Your Honor, this whole process about EPA's  
22       review of Georgia-Pacific's deliverables and its replacement of  
23       the state as the lead agency is relevant to this case because  
24       NCR is --

25               THE COURT:    I'm sorry to interrupt you but who is

1 Mr. Roth?

2 MR. SHEBELSKIE: He is the lawyer for NCR who was  
3 taking the deposition.

4 THE COURT: All right. Please go ahead.

5 MR. SHEBELSKIE: Yes. NCR challenges in part  
6 Georgia-Pacific's entitlement to recover its past costs  
7 incurred in connection with doing this work. Because they  
8 argue, pointing in part to Mr. Cornelius's testimony, that  
9 Georgia-Pacific was dragging its feet, driving up the costs of  
10 the work because obviously if you have to go through more and  
11 more drafts, if you submit drafts that agencies reject, that  
12 adds more costs, and that's all part of the hundred million  
13 dollars in past costs for which we are seeking compensation.

14 Also, Your Honor, one of the factors, equitable  
15 allocation factors is the cooperation of the parties, have they  
16 cooperated with the pertinent agencies here and NCR does and  
17 will rely on this type of testimony to say that Georgia-Pacific  
18 really wasn't cooperative, that it was basically running a sort  
19 of guerilla warfare behind the scenes, and EPA and the state  
20 department both viewed Georgia-Pacific as noncooperative, and  
21 indeed, the EPA had to step in in order to compel more  
22 cooperation from Georgia-Pacific.

23 In addition, Your Honor, Mr. Cornelius goes on  
24 starting on page 235 of his deposition and ensuing pages here  
25 for something that frankly -- well, certainly something that's

1 not in the administrative record and requires a deposition to  
2 explore. He says before he was replaced as the project manager  
3 he and one of his colleagues, a Mr. Al Howard, flew to EPA, and  
4 I'm not sure whether that's in Washington or the regional  
5 headquarters in Chicago, but in any event, he relayed, starting  
6 his testimony that's highlighted here on page 235, that, "He  
7 and Mr. Howard on behalf of the State Department of  
8 Environmental Quality met with EPA to come up with a cleanup  
9 plan for the river." This is in about the year 2000 when the  
10 substitution was made. And he says in that meeting ultimately  
11 that the EPA agreed with Mr. Cornelius that there needed to be  
12 dredging of the river, and that would be the plan, that was how  
13 they will proceed. And that really is embodied on page 240 of  
14 his deposition testimony where he's asked, "And it was your  
15 impression at the end of the meeting that the EPA was on board  
16 with your proposal?" And he responds, "That's what he told  
17 us," referring to the EPA official he is meeting with, "That's  
18 what they told us. They said that's the way we'll proceed."

19 And what he recounts in his deposition is that somehow  
20 he believes Georgia-Pacific interceded behind the scenes and  
21 forced the firing of Mr. Cornelius as the project manager for  
22 the state and the project manager at the EPA who he met, and  
23 that he is referring to here, and scuttled the supposed  
24 agreement between EPA and the state to clean up the river  
25 through a dredging operation that they agreed to in this

1 meeting.

2 Now, Georgia-Pacific is not in that meeting. I'm  
3 highly dubious that meeting actually took place, or the content  
4 of it was as Mr. Cornelius described it. But clearly this is  
5 something that Georgia-Pacific needs discovery of. And we can  
6 only get that through a deposition of the EPA. We have  
7 Mr. Cornelius's take on it. We are entitled certainly under  
8 the rules to EPA's testimony on this very important topic.

9 THE COURT: There is the allegations that  
10 Georgia-Pacific stepped in at some point to scuttle the plan  
11 talked about in this deposition?

12 MR. SHEBELSKIE: Yes, sir. Mr. Cornelius in his  
13 deposition here talks about Georgia-Pacific he believes went on  
14 a witch hunt and had him fired and had the EPA official fired  
15 as well. Removed from the project, not fired from their  
16 respective agencies. Removed from the, removed from the  
17 project.

18 THE COURT: But in fact EPA did step in and take over.

19 MR. SHEBELSKIE: EPA took over, but did not in fact  
20 decide -- the two individuals were replaced as project  
21 managers, and EPA did not in fact in 2000 decide that a  
22 dredging of the river was an appropriate remedy.

23 THE COURT: All right. But they did take over as the  
24 lead agency.

25 MR. SHEBELSKIE: They did take over as the lead



1 agency. But, again, Mr. Cornelius's position is that it took  
2 over as the lead agency because Georgia-Pacific was not  
3 cooperating with the agencies, and EPA needed to be the bigger  
4 gun, or bigger club so to speak to beat us over the head. I  
5 don't believe that's an accurate depiction of how those events  
6 came to happen, but we are certainly entitled to see if EPA  
7 agrees with Mr. Cornelius's characterization of EPA's reasons  
8 for doing that.

9 Now, again, Your Honor, it may well be that at trial  
10 Mr. Cornelius's testimony on behalf of EPA, saying what EPA's  
11 views were, some of that will not be admissible because he  
12 can't speak on behalf of the EPA, and we did object in the  
13 deposition to most of those questions, but, again, for  
14 discovery purposes we have to be forearmed with testimony to  
15 rebut this if it can come in.

16 And EPA says in its moving papers that it's not  
17 appropriate in a CERCLA action to collaterally attack agency  
18 decisions, be them the time critical removal decisions, or  
19 maybe their decision is not to in 2000 decide a cleanup.  
20 Again, may well be the case ultimately that Judge Jonker rules  
21 on that, that NCR can't mount these kinds of collateral attacks  
22 to agency decision making and go beyond the administrative  
23 record. But clearly they have conducted discovery to elicit  
24 such parol evidence outside the administrative record.

25 THE COURT: They being --

1 MR. SHEBELSKIE: They being NCR. And intend to  
2 introduce it, and we need to be able to respond to that on a  
3 factual level through deposition testimony of EPA if it's  
4 coming in.

5 So that's topics 8 and 9, Your Honor. Kind of gives  
6 you the context of why that's relevant and why we need a  
7 deposition on those topics.

8 And then, Your Honor, 10, 11 and 12 I would lump  
9 together because they concern really the amounts and nature of  
10 the PCBs that are at the site that are the contamination PCBs.  
11 Those topics are of course the sources of the PCBs at the site,  
12 the PCBs that predominate and necessitate the cleanup and any  
13 estimates of total PCBs.

14 Clearly this is a relevant topic. The parties have  
15 exchanged expert testimony.

16 Well, first of all, you will remember from a couple  
17 months ago a motion that NCR brought against Georgia-Pacific to  
18 compel, and of course also against International Paper, they  
19 wanted, very importantly, say this is critical, we need to know  
20 how many PCBs are in the river, who they came from, what the  
21 source was and all these sorts of things. And of course the  
22 parties have now exchanged opening expert reports, and NCR has  
23 certainly provided their estimations of what they think on a  
24 year by year, mill by mill basis each mill contributed to PCBs  
25 at the site, and how much are there, and how much were put in

1 the river historically, how much remain, and where the  
2 remaining ones came from. So these are clearly relevant  
3 topics. I don't think EPA would suggest that they're not  
4 relevant topics.

5 And to the extent EPA has any fact information on  
6 these topics that's not publicly disclosed, and to the extent  
7 that they have opinions one way or the other, the fact that  
8 they have made a decision one way or the other as you can't  
9 make the fine gradations that NCR is trying to advance in here,  
10 that is something that is obviously relevant and we need to  
11 know.

12 So, Your Honor, those are the --

13 THE COURT: Has the EPA not provided in some written  
14 material somewhere the answer to number 10 as far as they know  
15 it?

16 MR. SHEBELSKIE: I believe there are, Your Honor, yes.  
17 Yes. They are in their certainly, for example, in their  
18 five-year review plan they provide an estimate on a gross  
19 total. I don't believe they have any estimates that are  
20 publicly disclosed, that I'm aware of, that I can recall, that  
21 break it down by mill, by year, and the like. Again, this can  
22 be -- perhaps this will be a very short topic of the  
23 deposition, these three, which is to say, yep, there is nothing  
24 that the EPA has done, the EPA has not undertaken any  
25 calculation or analysis other than the gross amount that's in

1 the river, and EPA has not and cannot do the fine gradation  
2 that NCR is advancing and wants the other parties to provide.

3 So, Your Honor, those are the topics. I should hope  
4 that it's fairly clear then that they are relevant and not over  
5 reaching, and would not present an undue burden to respond to.

6 And then, Your Honor, really dealing, addressing the  
7 topic of undue burden here, obviously in this case this is the  
8 only one, one and only deposition of the EPA. The EPA worried  
9 that perhaps this would open them up, a ruling for  
10 Georgia-Pacific will open up the door to allow the other  
11 parties to serve their own 30(b)(6) notices but that's not  
12 going to happen because discovery cutoff has passed. So that  
13 won't occur here.

14 And then they also say more broadly that, well, they  
15 don't want to be subjected to deposition notices and sort of  
16 every little penny ante incident involving environmental  
17 matters that might occur. Well, with respect, Your Honor, this  
18 is not a penny ante incident. This is a --

19 THE COURT: I hope not. Because if it was I would  
20 hate to see what the big cases were.

21 MR. SHEBELSKIE: Exactly, Your Honor. This is a  
22 matter that is a quarter century in the making so far. Since  
23 1990 this has been a Super Fund site, and Georgia-Pacific has  
24 been in litigation or under consent orders in that whole time.  
25 This is a case where the past costs alone exceed a hundred

1 million dollars. And if ultimately the agency, EPA is going to  
2 compel a cleanup of Lake Allegan, dredging of the lake, the  
3 costs could easily exceed a billion dollars. And all of this  
4 is being done, instigated, necessitated in consequence of the  
5 EPA's designation of this site as a Super Fund site. So we  
6 wouldn't be here in front of you, Your Honor, if it wasn't for  
7 the EPA. And as the result of the EPA's designation of this  
8 site they have caused Georgia-Pacific to spend well over a  
9 hundred million dollars over the last quarter century and  
10 potentially have Georgia-Pacific on the hook for a billion  
11 dollars or more in the future. Certainly this is not an  
12 ordinary case. This is not a case that is run of the mill, is  
13 going to be repeated, and certainly the needs of this case  
14 justify the discreet deposition on the topics that we have  
15 reviewed here.

16 And this will not impose an undue burden on the  
17 agency. They say, well, their employees are busy, they have  
18 got lots of things to do for the government, and I understand  
19 that. But really I would have thought since Clinton v. Jones  
20 that really the argument from a government official that they  
21 can't find even one day to appear for a deposition is sort of  
22 behind us. Even the President could find a day to be deposed.  
23 And here we have an agency that has thousands, maybe tens of  
24 thousands of employees; they can identify who they want their  
25 witness to be. And we have got plenty of time to work with

1       them, Your Honor. Our trial is not until September. And so we  
2       have several months to accommodate the EPA's schedule, for them  
3       to find one employee to come for a couple of hours to sit down  
4       to be deposed on these important topics in this billion dollar  
5       case. And we can go where they are, where the witness is; we  
6       can accommodate the witness; if he is in Chicago in the  
7       regional office or in Washington in the headquarters, we will  
8       go there. So we can be very flexible on the location, we can  
9       be very flexible on the time because we have the luxury of time  
10      here. And, Your Honor, I can assure you, as not only a member  
11      of the bar, but based on past experience in this case, that we  
12      don't drag out these depositions. Just like the MDEQ one we  
13      were able to conduct our examination in three hours or so.  
14      That's what I would anticipate we would have here on these  
15      topics.

16               So for all these reasons, Your Honor, I ask that you  
17      grant the motion and order the deposition to proceed. Thank  
18      you.

19               THE COURT: Thank you, counsel. Before I ask a  
20      response from the EPA, are there any other parties that wish to  
21      join in on the side of the proponent of this motion so that we  
22      have all the arguments on the table so that the EPA can address  
23      them?

24               MR. PARKER: Your Honor, John Parker on behalf of  
25      International Paper. We may have an interest in some very

1 specific topics that are included in the motion, but depending  
2 upon what the EPA says in their position, I may actually not  
3 have anything to say. So if I can, I would like to wait and  
4 hear.

5 THE COURT: All right. That's fine.

6 MR. PARKER: I suspect I will be more in support of  
7 the EPA on that, those topics than against them. So it may  
8 make sense for me to go.

9 THE COURT: You don't want Georgia-Pacific to get any  
10 more ammunition in the opposition to your arguments than they  
11 can possibly get. I understand your position. Mr. Fields.

12 MR. FIELDS: Your Honor, Geoff Fields for NCR. What  
13 he said.

14 THE COURT: You're for NCR, I realize that. All  
15 right. We are going to take a short break because I have a  
16 telephone call to make. I need to speak to my wife.  
17 Mr. Parker will appreciate the importance of that. And we can  
18 all relax for about five or ten minutes. We will be right back  
19 here.

20 MR. PARKER: Thank you, Your Honor.

21 THE CLERK: All rise, please. Court is in recess.

22 (Recess taken, 10:43; Resume Proceedings, 11:04 a.m.)

23 THE COURT: Counsel, good morning.

24 MR. HANSON: Good morning, Your Honor. My name is  
25 Andrew Hanson. I'm a trial attorney with the United States

1 Department of Justice, Environmental Enforcement Section.

2 THE COURT: All right.

3 MR. HANSON: The reason I point that out, Your Honor,  
4 is because the context of EPA's presence here today, or United  
5 States's presence here today is important. This is a pending  
6 enforcement investigation at the Kalamazoo River site. That  
7 investigation has been ongoing for a number of years now. The  
8 case is not closed, unlike some of the, the kind of case cited  
9 In re Packaged Ice in the Eastern District of Michigan. The  
10 case is actually ongoing. Enforcement materials are continuing  
11 to be prepared, deliberative internal materials are continuing  
12 to be prepared by the agency as it considers what additional  
13 response actions might be needed at the Kalamazoo River site.

14 THE COURT: How long has this investigation been going  
15 on?

16 MR. HANSON: Well, as counsel said, the site was  
17 listed on the National Priorities List in 1990.

18 THE COURT: Certainly no rush to judgment then.

19 MR. HANSON: Well, it's a, a very extensive site, Your  
20 Honor. The river site alone is 80 miles in length from the  
21 Morrow Dam to Lake Michigan, as the Court surely knows.

22 Now, with that in mind, that's the framework by which  
23 we analyze -- that informs the framework by which we analyze  
24 Georgia-Pacific's request for testimony.

25 THE COURT: Not an idle question, but when is this



1 investigation ever going to end? What constitutes a conclusion  
2 to the investigation?

3 MR. HANSON: Well, for the Super Fund investigation,  
4 Your Honor, that would end when all of the remedial actions  
5 have been selected and to be performed. Not all the remedial  
6 actions have been selected, and even then there is still some  
7 implementation oversight of the remedies that are actually  
8 performed. But it is a lengthy process, as I'm sure counsel  
9 for Georgia-Pacific can attest.

10 And isn't quite done yet, or it isn't done at all yet,  
11 especially with respect to Operable Unit 5, the river site, and  
12 also Operable Unit 1, which is partially at issue in the  
13 underlying litigation here, Your Honor. And would also be  
14 covered by the topics in Georgia-Pacific's subpoena.

15 THE COURT: Is it completed as to the remaining ones  
16 that are not 1 and 5?

17 MR. HANSON: For the most part, Your Honor -- I want  
18 to be careful here. For the most part that is correct. Oh,  
19 Operable Units 2 through 4 have remedies selected, the work is  
20 either completed or it's ongoing. And that, again, is  
21 information that would be in EPA's second five-year review  
22 which contains, frankly, most of the information that's  
23 responsive to the subpoena topics. And I'll address that  
24 shortly.

25 But first I want to get to the standard that counsel

1 addressed for reviewing the subpoena that's been issued.

2 I think it's indisputable that there is majority rule  
3 out there for agency responses to subpoenas for documents and  
4 testimony. The majority rule is that those requests are  
5 analyzed under the Administrative Procedure Act's deferential,  
6 arbitrary, capricious and not in accordance of law standard. I  
7 want to be clear that the United States is not taking the  
8 position that there is some blanket override of the Federal  
9 Rules of Civil Procedure necessarily. The court reviews the  
10 agency's decision on a case-by-case basis as to whether or not  
11 it was proper to withhold the testimony or documents. And the  
12 reason I think the reason underlying the Touhy regulations is  
13 important, the policy considerations that are in play here, the  
14 context here is to agencies, not a party. Agency is not  
15 involved in the underlying litigation. And as such, the agency  
16 should be permitted to look at the limited resources that it  
17 has, the cumulative burdens of permitting testimony, and the  
18 risk of the appearance of picking sides in the underlying case,  
19 all of which are --

20 THE COURT: Well, speaking of your argument or not, if  
21 you were a party, I see the argument that you're making, but on  
22 the other hand, the APA would apply, if this were an APA  
23 action, but here you are somebody who is being asked to supply  
24 information under the Federal Rules of Evidence, or I'm sorry,  
25 the Federal Rules of Civil Procedure, and is that really the

1 same situation as when you are rendering a ruling that the APA  
2 would apply to. It seems like you're using the APA proceedings  
3 or procedure to apply to a rather collateral or tangential  
4 situation where you're not a player to this litigation. Sounds  
5 like this litigation is more suited, or pardon me, the Federal  
6 Rules of Civil Procedure are more suited for this type of  
7 proceeding.

8 MR. HANSON: Well, if I may clarify, Your Honor. If  
9 the deposition were ordered here, it would be taken pursuant to  
10 the Federal Rules of Civil Procedure. There is no question  
11 about that. But it's because the agency is not a party,  
12 meaning it hasn't done something to be sued and it hasn't sued,  
13 so it hasn't subjected itself to the Federal Rules of Civil  
14 Procedure. EPA's --

15 THE COURT: That would apply to anybody that's not a  
16 party to this litigation that receives a subpoena.

17 MR. HANSON: Right, Your Honor.

18 THE COURT: Subject themselves either. But they are  
19 still required to come in and be deposed.

20 MR. HANSON: Right, Your Honor. But I would say that  
21 a federal agency is not just anybody. It is a taxpayer funded  
22 institution with a mission directed by Congress to do certain  
23 tasks.

24 THE COURT: Well, Congress took that into  
25 consideration when it drafted or passed on the rules of civil

1 procedure. These rules are authorized by Congress. And it  
2 provided for these rules to apply it to a congressional, I'm  
3 sorry, to a governmental agency.

4 MR. HANSON: Yes, Your Honor. And I think I  
5 understand what the Court is saying in that regard. But at the  
6 same time, Congress also authorized the agencies to promulgate  
7 housekeeping regulations that manage how it uses its resources  
8 in response to these sorts of requests. EPA has promulgated  
9 these regulations like many other agencies, and courts by and  
10 large have upheld EPA's decision to apply those regulations.

11 There is something I want to point out about In re  
12 Packaged Ice that was cited by counsel as well as Michigan  
13 State versus Gardner.

14 First, Michigan State versus Gardner mainly relies on  
15 the reasoning that In re Package does. There is some  
16 unfortunate facts I think in the Michigan State case where it  
17 appears that the agency didn't respond at all to the subpoena  
18 and then attempted to rely on the Touhy examples. That's  
19 difficult. But In re Packaged Ice is important --

20 THE COURT: That was Judge Scoville's case.

21 MR. HANSON: I believe Michigan State was Judge  
22 Scoville's case.

23 THE COURT: Yes. Is that the one you are talking  
24 about or not?

25 MR. HANSON: I'm shifting between Michigan State and

1 In re Packaged Ice. Michigan State, the Michigan State case  
2 mainly relied on the reasoning in In re Packaged Ice. In re  
3 Packaged Ice is important because although it held that the  
4 federal agency was subject to Rule 45, there are a couple of  
5 distinguishing factors there. First, as I mentioned when I  
6 started, the law enforcement investigation there was closed.  
7 It was done. And the Court was analyzing whether or not the  
8 law enforcement privilege would apply to allow the agency to  
9 withhold tape recorded interviews in that case. But even as  
10 the Court held that Rule 45 applied to the agency, it actually  
11 analyzed the question of whether or not the agency was required  
12 to disclose the information pursuant to the agency's own  
13 regulations. It looked at and walked through the agency's own  
14 regulations here. And that's what we are proposing here is the  
15 Court apply and review the EPA's regulations to determine  
16 whether EPA's decision to withhold the testimony was proper.

17 And I think it's also important to point out that --

18 THE COURT: Federal Rules of Civil Procedure or under  
19 the APA.

20 MR. HANSON: I'm sorry. I talked over you, Your  
21 Honor.

22 THE COURT: Did Packaged Ice use the APA analysis?

23 MR. HANSON: It used the agency's regulations to  
24 determine whether or not it was proper for the agency to  
25 withhold. But I don't believe In re Packaged Ice used an

1 arbitrary and capricious standard to review the decision under  
2 those regulations.

3 THE COURT: I thought I heard you say that they  
4 reviewed the agency's regulations and whether the agency  
5 properly applied its regulations. And that's what you were  
6 asking this Court to do.

7 MR. HANSON: Yes, Your Honor, we are asking that Court  
8 to do that.

9 THE COURT: But they didn't use the arbitrary and  
10 capricious standard.

11 MR. HANSON: Yes, Your Honor. That's correct.

12 THE COURT: So you are asking this Court to follow  
13 Packaged Ice and the standard they used in Packaged Ice.

14 MR. HANSON: Not necessarily, Your Honor. What I'm  
15 asking the Court to do is to look at the propriety of the  
16 agency's decision to withhold the testimony pursuant to the  
17 agency's regulations and not necessarily Rule 45.

18 THE COURT: What standard should this Court use?

19 MR. HANSON: What standard of review -- well, our  
20 position is that the standard of review that governs should be  
21 the arbitrary and capricious standard should be -- we are not  
22 asking the Court to apply In re Packaged Ice in total. I just  
23 wanted to point out some distinguishing features about that  
24 case.

25 I also wanted to point out, Your Honor, that Bankers

1 Trust did not squarely address this issue with respect to  
2 whether an agency itself could withhold documents. That was an  
3 instance in which a company had issued a Rule 34 request to  
4 another party in the case and then asked, and then that other  
5 party declined to produce the material because of some agency  
6 regulations that were at issue. It isn't directly on point.  
7 It doesn't directly control this case. There is some  
8 distinguishing facts there.

9 But I think the more important point that I want to  
10 make, and that I most like the Court to remember, is that there  
11 is a prevailing view out there that, a prevailing rule, I  
12 should say, from the courts that the standard of review is  
13 arbitrary and capricious when analyzing an agency's decision to  
14 withhold documents and testimony. Many of the cases cited in  
15 our brief, Your Honor, relate to depositions. Some also relate  
16 to documents, but they take on those special facts and  
17 circumstances associated with compelling an EPA witness, and  
18 usually it's EPA -- in several of the cases, for example, Town  
19 of Wolfeboro, Boron, the Boron case, and Davis, those are all  
20 EPA employees at Super Fund, who are working on Super Fund  
21 sites who were asked to be deposed.

22 And those courts found that --

23 THE COURT: Were those individuals who were  
24 subpoenaed?

25 MR. HANSON: I believe they were individuals who were

1 subpoenaed, Your Honor, but I could check the cases to make  
2 sure. In any event, I'm not sure that it matters here. And to  
3 the extent that Georgia-Pacific is relying on the fact that it  
4 has issued a Rule 30(b)(6) notice, I think that helps us, I  
5 think that helps our case here.

6 THE COURT: Why is that?

7 MR. HANSON: That's because Georgia-Pacific is trying  
8 to get the agency's official positions. They are trying to  
9 understand what the company, or what EPA's positions are  
10 officially. Those official positions are found in documents.  
11 They wouldn't be found in the kind of, for lack of a better  
12 word, intrigue and behind the scenes, and alleged back and  
13 forth that appears to be at issue. The agency's position is  
14 found in the administrative record in the underlying actions.  
15 It would not be found in the head of an individual employee.

16 The important thing here I think also is that with  
17 respect to an individual employee -- well, I have to kind of  
18 move on from that.

19 I think the main point is is that --

20 THE COURT: Well, if somebody has subverted the  
21 process, that can only be done by individuals. Wrongdoing can  
22 only be done by individuals. In fact, any doing by any  
23 organization can only be done by individuals. And how do we  
24 find that out if you're not going to let them talk to the  
25 people that were involved?



1 MR. HANSON: Well, I think that they would have to  
2 show some compelling need or reason to supplement the  
3 administrative record.

4 THE COURT: The other side wants to attack the  
5 decisions represented by that record or wants to go beyond that  
6 record. Now, whether Judge Jonker allows them to do that or  
7 not is a question for another day. But if Judge Jonker should  
8 allow the other side to go beyond the record, shouldn't this  
9 side be, shouldn't this party, Georgia-Pacific, be allowed to  
10 meet those arguments or have discovery and to at least see if  
11 they can meet those arguments?

12 MR. HANSON: Your Honor, I think the answer to that  
13 question is probably no. To supplement the administrative  
14 record certain exceptions have to be met. And there doesn't  
15 appear to be any showing by any party in the action so far that  
16 those exceptions would be met. Allowing Georgia-Pacific to  
17 probe the --

18 THE COURT: They're not challenging your decision in  
19 the sense that, as I understand, Georgia-Pacific is not  
20 challenging your decision and said your decision is wrong, they  
21 want you to change your decision. They want to explore what  
22 happened so that if anybody else were to challenge your  
23 decision, or challenge what they did based on your decision,  
24 they can defend themselves and their actions.

25 MR. HANSON: Yes, Your Honor. I think I understand

1       that.

2               THE COURT:   Why is there anything privileged or secret  
3       about that?

4               MR. HANSON:   Well, I think I understand, I think I now  
5       understand why Georgia-Pacific wants that information, and much  
6       of what, much of what I heard today was somewhat new to me.  
7       But I think allowing -- our position would be that allowing  
8       Georgia-Pacific to ask questions outside the administrative  
9       record simply compounds the error of allowing improper judicial  
10      review of EPA's decisions.   For example, in Exhibit H to our  
11      brief, Your Honor, is the Action Memorandum for the time  
12      critical removal action at the Plainwell Dam 2 Impoundment that  
13      was undertaken in 2009.   That Action Memorandum explains why  
14      EPA determined that the action was in fact time critical.   It  
15      was due to the nature and extent of the contamination at issue.  
16      That is the administrative record.   That's the agency's  
17      decision and that's the agency's position.   Asking questions  
18      around that or behind that was typically improper under CERCLA,  
19      and that's why we, that's one of the reasons why we said no to  
20      the deposition subpoena is because it essentially exposes EPA  
21      to being deposed on information that is frankly limited to the  
22      administrative record and the basis of its decision.   The  
23      Action Memorandum itself attaches the administrative record --  
24      not in our brief, Your Honor, we didn't want to flood the  
25      Court's docket but the information is there.   It's in the

1 documents.

2 And so, again, our position would be that in light of  
3 that, it would be improper to put up an EPA witness to answer  
4 those types of questions when EPA's official position --

5 THE COURT: Well, that might be an official position,  
6 and that's perfectly appropriate. But here one of the parties  
7 directly affected by it in this rather significant litigation  
8 of a rather significant cleanup which is alleging that there  
9 was impropriety. In fact, they are alleging that you were a  
10 part of that impropriety. And the other side who is alleged to  
11 have conspired with you in that impropriety wants to defend  
12 itself from allegations of impropriety. Now, that may not be  
13 of concern to the EPA that it's alleged to have been involved  
14 in some impropriety. But the other side has a very direct  
15 interest in protecting itself. Why should it not be able to  
16 obtain testimony or facts or discovery that allows it to do  
17 that? It doesn't mean your decision is changed, in fact, one  
18 might wonder why you would not want to defend your position.  
19 But that's a question for another day, perhaps.

20 MR. HANSON: Well, to be clear, Your Honor, if it came  
21 up in the context of enforcement action, and if that arose, you  
22 know, EPA would again point to the administrative record and  
23 ask if there is something outside of the administrative record,  
24 if there is some reason, for example, NCR, that you think  
25 information is missing from the administrative record that

1 needs to be supplemented then you should, then you should show  
2 us what that information is and explain why it should be  
3 included. NCR hasn't done that, to my knowledge.  
4 Georgia-Pacific hasn't done that, to my knowledge. Instead we  
5 are kind of wandering beyond the administrative record to probe  
6 the mental impressions and alleged back room conversations  
7 that, frankly, I'm not aware of, and --

8 THE COURT: Well, there is sworn testimony that that  
9 happened, apparently. That's what was pointed to this morning.  
10 So you can't have a case tried before you open up the door to  
11 see if it ought to be tried. You gather the evidence  
12 beforehand, and then you have your trial. Again, it's not a  
13 matter of attacking the decisions of the EPA in an EPA  
14 enforcement proceeding, and whether the record should stand or  
15 not, it's going to tangential matters, but ones that directly  
16 involve how this record was produced.

17 MR. HANSON: And respectfully, Your Honor, I think we  
18 just see it differently.

19 THE COURT: Obviously.

20 MR. HANSON: We are concerned that allowing that kind  
21 of deposition of an EPA witness effectively does open up the  
22 administrative record and change the administrative record in  
23 some way, especially where you're asking questions that aren't  
24 EPA's official position. And that is what Georgia-Pacific  
25 claims to seek here. None of that would be considered EPA's

1 official position. And that's why the topics were so  
2 problematic, apart from the difficulty of --

3 THE COURT: So EPA might not deny that any of this  
4 happened. It might not be in a position to deny any of these  
5 allegations. You have to take a position different from the  
6 record. That's interesting.

7 MR. HANSON: I'm not sure if that's, that's  
8 necessarily true either, Your Honor, without further  
9 investigation and talking with EPA. What I do know at this  
10 point is that EPA's decision on the time critical removal  
11 action in 2009 is reflected in the administrative record.

12 If I can go on. That record is either adequate or it  
13 isn't. If one of the parties has a reason to supplement that  
14 administrative record, they can ask EPA to do that. But I'm  
15 not sure that this case --

16 THE COURT: I think that's exactly what they are  
17 doing. They are asking you to supplement it under oath at a  
18 deposition.

19 MR. HANSON: I'm not sure I understood it that way,  
20 Your Honor. That they are asking the EPA to supplement the  
21 administrative record. I think that there's a process and a  
22 body of law that applies in that circumstance. But in --

23 THE COURT: You thought it was an improper question,  
24 somehow intruded upon your decision making, couldn't you raise  
25 that objection at the time?

1 MR. HANSON: Yes, Your Honor, we would. If we were  
2 ordered to produce a witness to be deposed, we will certainly  
3 reserve all of our objections to the questions that would be  
4 answered during the deposition, that's right. And to the  
5 extent it probed privileged information, we would instruct the  
6 witness not to answer.

7 THE COURT: Sure. So what's the problem in responding  
8 to the 30(b)(6) deposition?

9 MR. HANSON: Well, maybe the most appropriate thing to  
10 do is to go through the topics. I think we expressed our  
11 concerns with respect to topic 6, an improper judicial review  
12 outside the administrative record.

13 I think EPA's topic 7 is another topic in which we  
14 would be concerned that the topic in total essentially asks for  
15 deliberative information. We would have to object to every  
16 question that comes along, that comes out along that topic  
17 because, as I said, there are many things that EPA is still  
18 considering, and with respect to the site. So topic 7 would be  
19 completely objectionable to us, Your Honor. It almost  
20 certainly would call for privileged information, and I will say  
21 that where a topic does seek privileged information,  
22 essentially in total, then it's a problem. I think it would be  
23 appropriate for the Court to protect the deponent from having  
24 to answer questions along those lines.

25 THE COURT: These are things that you would never sit

1 down and talk about with any of these parties?

2 MR. HANSON: Meaning would the EPA sit down in the  
3 context of settlement negotiations and discuss potential future  
4 response actions?

5 THE COURT: These parties, with the public, with  
6 anybody. I mean this is all totally private information that  
7 even as a public agency you would never express your present  
8 expectations regarding what needs to be done in the future?

9 MR. HANSON: Where those --

10 THE COURT: Or what you were considering?

11 MR. HANSON: And where that information is public, it  
12 would be found in things like the feasibility study for Area 1  
13 of Operable Unit 5, which was I believe just recently completed  
14 by Georgia-Pacific. That is the type of document that does  
15 explore, as I understand it, potential future cleanup actions.  
16 But, again, that document would speak for itself and the  
17 information about what the potential cleanup options would be  
18 found there. Not through --

19 THE COURT: That was completed by Georgia-Pacific.

20 MR. HANSON: I believe so, yes.

21 THE COURT: Does that reflect what the EPA's  
22 expectations are?

23 MR. HANSON: EPA I believe approved the feasibility  
24 study pursuant to --

25 THE COURT: Number one, I haven't read it, and that

1 would presuppose I even understood or understand it if I did  
2 read it. But it may put forth alternatives and so forth. I  
3 don't know what approval of that would mean. But I think the  
4 question that they want to explore is what are the EPA's  
5 expectations. Are those set forth in their document?

6 MR. HANSON: Well, when EPA, and this goes to the next  
7 topic, topic 8, when EPA approves a document like that, it's  
8 essentially giving the blessing to go forward. EPA is saying  
9 you're doing it but we approve your work, and go forth,  
10 essentially. And that's done pursuant to a detailed --

11 THE COURT: You're giving your blessing to it.

12 MR. HANSON: Exactly, exactly.

13 THE COURT: You're giving your blessing to the one  
14 they just finished?

15 MR. HANSON: Yes, I believe it's been approved. I  
16 believe it has been approved. And if that's not correct, there  
17 has been a public meeting at least issued on it recently, the  
18 feasibility study. And if that's not correct, I'll let the  
19 Court know.

20 But the main point is even if EPA hadn't officially  
21 approved it, the work was done pursuant to an Administrative  
22 Order on Consent between Georgia-Pacific and EPA that was  
23 authorized in 2007. That Administrative Order on Consent has  
24 detailed review and approval procedures, so, for example, EPA's  
25 process for reviewing and approving deliverables, that's the



1 kind of document that lays out that process. That process is  
2 laid out there. That's EPA's official position through the  
3 Administrative Order on Consent of how it will review and  
4 approve the work that Georgia-Pacific does. That's another  
5 example of a document that contains the information that would  
6 be responsive to the topic. And it would be somewhat awkward  
7 for an EPA witness to answer questions about an Administrative  
8 Order on Consent that Georgia-Pacific signed and agreed to at  
9 the example. And so that's one of the concerns with topic 8.

10 Topic 9, there is a memorandum of agreement between  
11 EPA and the State of Michigan as to who will be the lead agency  
12 at the site, as I understand it, and even a subsequent site  
13 specific amendment to that memorandum of agreement. And,  
14 again, information found in a document that explains that, as I  
15 understand it, Your Honor, I haven't seen that particular  
16 document, but as I understand it, that contains the responsive  
17 information.

18 Topic 10, 11 and 12, I think as counsel acknowledged,  
19 that information would likely be found in the five-year reviews  
20 that EPA has prepared.

21 THE COURT: Going back to number 9, I think that goes  
22 to the deposition that counsel was talking about. And there is  
23 some question about -- some question underlying the  
24 proceedings leading up to the EPA assuming responsibility as  
25 the lead agency at the site. And this went beyond simply a

1 decision to take over from the state.

2 MR. HANSON: Yeah.

3 THE COURT: This went outside anything in the official  
4 record. I think this is perhaps the allegation, this is the  
5 time these allegations were made. Again, is this something  
6 that they are not entitled to inquire about?

7 MR. HANSON: Your Honor, this might be the one area  
8 that could be ripe for deposition if it were limited to that  
9 sort of thing. You know, I would expect that the reasons for  
10 EPA taking over would be in the agreement. For example, the  
11 five-year review references the agreement and says that it was  
12 simply in the public's interest for EPA to take over, and I  
13 would expect that one of those reasons is that EPA has more  
14 resources from an enforcement perspective and from I think a  
15 technical and analytical perspective; that shouldn't be  
16 surprising that the federal government would have resources  
17 that perhaps the state wouldn't have. But, Your Honor, if  
18 ordered to produce a witness, this might be one area where the  
19 witness could be prepared.

20 THE COURT: Well, I would assume that you have more  
21 resources too, but on the other hand, they are able to produce  
22 a witness, they have the resources to do that, and apparently  
23 you don't have the resources to produce a witness. So I  
24 question whether or not the federal government does have more  
25 resources.

1                   Perhaps I'm just --

2                   MR. HANSON: Well, Your Honor, it's not so much that  
3                   the agency doesn't have the resources; that it's trying to  
4                   manage its resources and use them as carefully and wisely as  
5                   possible.

6                   THE COURT: I understand the argument. I understand  
7                   you have to make the argument. If I've heard an argument  
8                   that's not persuasive in any of these briefs, that's probably  
9                   it.

10                  That brings me to the one question I had about leaving  
11                  the jurisdiction. What was that argument about? You have to  
12                  travel to a different judicial for the purpose of --

13                  MR. HANSON: The place of compliance is designated to  
14                  Benton Harbor. But if --

15                  THE COURT: That's a long ways away from where?

16                  MR. HANSON: Chicago. It's 99 miles.

17                  THE COURT: How far?

18                  MR. HANSON: 99 miles.

19                  THE COURT: 99 miles.

20                  MR. HANSON: Yeah, I think, yes.

21                  THE COURT: Do the people that supervise the Kalamazoo  
22                  River ever go to the Kalamazoo River?

23                  MR. HANSON: Yes, Your Honor, they are at the  
24                  Kalamazoo River from time to time.

25                  THE COURT: They travel from Chicago to go to the

1 Kalamazoo River?

2 MR. HANSON: Yes, they do, Your Honor.

3 THE COURT: They have to go past Benton Harbor to get  
4 to the Kalamazoo River?

5 MR. HANSON: It's along the way, Your Honor.

6 THE COURT: Yeah. Okay. They have to actually  
7 probably travel farther to get to the Kalamazoo River.

8 MR. HANSON: Yeah. When EPA is engaged in its  
9 official duties to clean up and oversee the work on the  
10 Kalamazoo River it does have to -- now I think I see where the  
11 Court is headed.

12 THE COURT: The jurisdiction of the court here, and  
13 the jurisdiction of the Kalamazoo River is where all this is  
14 taking place. I don't know what Chicago has got to do with  
15 anything. If the guy wants to live in Chicago, work in  
16 Chicago, I think he is traveling outside of the jurisdiction of  
17 where this is taking place. Why doesn't he move to here? Why  
18 doesn't EPA office set up here? This is a billion dollar case.  
19 We could use an EPA office here in Western Michigan. Save a  
20 lot of money. I didn't realize how much he was traveling  
21 outside of our jurisdiction to supervise this district. I  
22 think our new congressman ought to look into this.

23 I suspect you're not even from this district.

24 MR. HANSON: From this district?

25 THE COURT: Your office isn't even in this district.

1 MR. HANSON: No, Your Honor, I'm based in Washington  
2 D.C.

3 THE COURT: You have 36 members of the Department of  
4 Justice across the street; none of them came over across the  
5 street to argue this case, and yet they send you from  
6 Washington D.C. to argue this case. Now, if that isn't an  
7 expenditure of funds, that surprises me too. If we are talking  
8 about traveling outside the jurisdiction for the purpose of  
9 taking a seven-hour deposition -- we could talk about this all  
10 day long, and I could just have fun with it. But I'm not going  
11 to say anything more.

12 MR. HANSON: Your Honor, I think the case is being  
13 managed out of Washington D.C.; I think counsel for  
14 Georgia-Pacific mentioned it's very complex, very detailed.

15 THE COURT: I'll mention that to your 36 colleagues  
16 across the street.

17 MR. HANSON: Not to say that they couldn't handle it,  
18 Your Honor. But I was assigned this matter.

19 THE COURT: You're doing a fine job. Actually a lot  
20 of those people did transfer from Washington D.C. to come out  
21 here to Western Michigan. Perhaps they like me. Or maybe that  
22 indicates why they maybe assigned this case to somebody in  
23 Washington D.C. who presumably doesn't have to deal with the  
24 snow as much as they do here. All right.

25 The cost factor cannot be a serious one. The time

1 factor cannot be a serious one. In a normal case, and  
2 certainly not in a case with the dollar and the importance of  
3 this case. As far as the public interest is concerned, I  
4 presume the EPA works in the public interest, I presume the  
5 interests of the EPA are the public interest, and I think  
6 that's how any matter ought to be considered. Would you agree  
7 that the interests of the EPA have to be coterminous or could  
8 he equal with the public interest?

9 MR. HANSON: Absolutely, Your Honor.

10 THE COURT: Wouldn't be any different from the public  
11 interest, by definition, I assume.

12 MR. HANSON: No, Your Honor.

13 THE COURT: Okay. So that gets us back to some of the  
14 other objections that were raised. And I only go down that  
15 road because these objections were kind of broad brushed. I  
16 think we have to look at them on a one-by-one basis. And I  
17 appreciate you spelling these out, what your objections are.

18 Now, you mention that Judge Scoville in the MSU case  
19 tracked the other case that you have discussed, Packaged Ice.

20 MR. HANSON: Yes, Your Honor.

21 THE COURT: Most of your discussion was focused on  
22 Packaged Ice. Did you think the analysis by Judge Scoville was  
23 appropriate or not? And of course I'm mentioning that case  
24 because Judge Scoville is a member, or was until a few months  
25 ago, a member of this court. So was his analysis correct or

1 not in your mind?

2 MR. HANSON: In our mind, Your Honor, the analysis was  
3 not correct. The analysis should have been under the  
4 Administrative Procedures Act, arbitrary and capricious  
5 standard.

6 THE COURT: Okay.

7 MR. HANSON: If I may, Your Honor, while I'm thinking  
8 of it. I think I did misspeak earlier with regard to whether  
9 EPA had approved the Area 1, Operable Unit 5 feasibility study.  
10 I believe it's just out for the public's consumption right now.  
11 I just want to correct the record in that regard.

12 THE COURT: That was the one that was just done.

13 MR. HANSON: Yes.

14 THE COURT: How long does it take to review or approve  
15 those?

16 MR. HANSON: It's hard to say, Your Honor. There's  
17 inevitably, from my understanding, going to be some back and  
18 forth between EPA and the preparer of the feasibility study  
19 where that entity is preparing it pursuant to Administrative  
20 Order on Consent.

21 THE COURT: That's Georgia-Pacific.

22 MR. HANSON: Yeah, in this case that's  
23 Georgia-Pacific. There are instances in which if there are  
24 certain deficiencies the agency can ask Georgia-Pacific to cure  
25 those deficiencies. That inevitably takes time. It's under

1 the agreement, it's the question is how, how serious are the  
2 deficiencies to warrant some subsequent action or EPA action,  
3 for example. But they are very technical documents. They take  
4 a considerable amount of time. They take a considerable amount  
5 of expertise. And so it's, it is not unsurprising that it  
6 would take sometime to complete a feasibility study or remedial  
7 investigation.

8 THE COURT: I suppose I wouldn't be doing justice to  
9 Georgia-Pacific if I let you sit down without asking you to  
10 respond to the Housekeeping Statute that they raised that added  
11 that last sentence that the statute does not give the agencies  
12 license to not provide material.

13 MR. HANSON: Even notwithstanding that last sentence,  
14 Your Honor.

15 THE COURT: Which is passed as a law by Congress and  
16 signed by a President of the United States. I'm particularly  
17 interested in that sentence.

18 MR. HANSON: Well, our position, Your Honor, is the  
19 agency is not withholding information. The information that is  
20 responsive to the subpoena topics, the agency's official  
21 positions are found in documents. We have objected to the  
22 burden of producing a witness. That is the crux of that.

23 So as I said, even as the Housekeeping Statute doesn't  
24 authorize the agency to categorically withhold documents or  
25 information, we're not doing that here, we are just declining



1 to produce a witness due to burden issues, the same  
2 consideration that would apply under Rule 26 and 45 as well as  
3 I note at the end of our brief.

4 THE COURT: Well, you are choosing what, what you are  
5 producing, rather than giving what the other side, what is  
6 being requested. In other words, you're selecting what you  
7 want to produce. So you really are withholding. You're  
8 withholding what somebody is requesting. Is that a fair  
9 statement?

10 You're limiting the availability of records to the  
11 public, are you not?

12 MR. HANSON: Yes, based on the objections that are  
13 stated in the response to the subpoena, the same objections  
14 that --

15 THE COURT: So the statute says this section does not  
16 authorize the withholding of information from the public or  
17 limiting the availability of records to the public. So the  
18 statute provides no authorization to limit what you provide,  
19 you would have to find it someplace else, wouldn't you?

20 MR. HANSON: Well, for example, there are limitations  
21 in the Freedom of Information Act that would authorize the  
22 withholding of certain information --

23 THE COURT: You're relying on the Freedom of  
24 Information Act?

25 MR. HANSON: The agency treats requests for document

1 subpoenas or subpoenas for documents as FOIA requests. And so  
2 it responds to those document subpoena requests as FOIA  
3 requests. So in that instance we would be relying on the  
4 Freedom of Information Act.

5 THE COURT: But they are not requesting a subpoena  
6 duces tecum here.

7 MR. HANSON: They haven't but NCR has in a separate  
8 request. But not in this case, that's right, Your Honor.

9 THE COURT: All right. So we are talking about a  
10 30(b)(6) deposition here. So we are not talking about FOIA.

11 MR. HANSON: In this limited instance, that's right,  
12 Your Honor.

13 THE COURT: So we come back to Section 301. And 301  
14 does not authorize withholding information from the public or  
15 limiting the availability of records to the public. So if that  
16 doesn't give you authorization, then you have to look someplace  
17 else if you're going to limit the availability of what you  
18 provide to the public. Fair enough?

19 MR. HANSON: Well, first I would like to -- EPA's  
20 regulations, since the Court --

21 THE COURT: I understand we get past Section 301 as  
22 the grounds for limiting what you're providing, is that a fair  
23 statement?

24 MR. HANSON: Right. And I think the way we get past  
25 is still EPA has lawfully enacted Touhy regulations which I

1 understand the Court is having some difficulty with.

2 THE COURT: I just want to know if we get past 301.  
3 Or are you still trying to rely on 301?

4 MR. HANSON: I'm trying to rely on EPA's Touhy  
5 regulations which are promulgated pursuant to 201 (sic), but if  
6 I may, the same objections that we would make, that we have  
7 made in response to the Touhy requests are the same objections  
8 we would make under Rule 45, as I note at the end of our brief  
9 on page, I believe it's page 10. For the same reasons Rule 45  
10 would allow the Court to limit the scope of the testimony or  
11 quash the subpoena altogether based on the burden concerns, the  
12 risk of revealing privileged information, and improper judicial  
13 review.

14 THE COURT: Stop a second. So you're relying on  
15 regulations promulgated pursuant to 301, which allow the head  
16 of the agency to promulgate regulations for his or her  
17 department for the conduct of its employees for the  
18 distribution of performance of its business and for the  
19 custody, use and preservation of its records, papers and  
20 property. Which does not authorize it to withhold information  
21 from the public or limit the availability of its records to the  
22 public.

23 So the head of the EPA promulgates these regulations,  
24 but they do in fact withhold information from the public as the  
25 EPA construes them. They issue them and they construe them,

1 and they say, well, we argue the regulations that we have  
2 issued, we are going to construe them in a way that in fact  
3 withholds information. Am I understanding that correctly?

4 MR. HANSON: I'm not sure I would completely see it  
5 that way, Your Honor. There isn't a decision by EPA to  
6 categorically withhold information. It's when doing so --

7 THE COURT: To use the old duck analogy - paddles like  
8 a duck and it quacks like a duck, and it looks like a duck,  
9 it's probably a duck. So you can say we're not doing it, but  
10 that's what you're doing. That's what you're accomplishing.  
11 You're promulgating the regulations that you're allowed to  
12 promulgate to accomplish something that the regulations are not  
13 supposed to promulgate or not supposed to accomplish.

14 MR. HANSON: I think I understand the Court's position  
15 in this regard, Your Honor, but unfortunately --

16 THE COURT: I'm in a real quandary. I had a case the  
17 other day, in fact I still have got it so maybe you can help  
18 me. Maybe I shouldn't be asking you because the other side  
19 isn't here. But they called up, they filed a motion, said we  
20 want an FBI investigation, an ongoing FBI investigation for  
21 their private litigation. I looked at that and I said, wait a  
22 minute, you can't subpoena the FBI investigation for your  
23 private litigation, can you? I thought it was open and shut.  
24 Obvious, can't do it. I read the statute. I get to this last  
25 line. And I'm sitting here reading this last line and I don't

1 know how to deny it. And nobody can tell me how to deny it.  
2 So I have an ulterior motive in asking you to give me some good  
3 reasons.

4 MR. HANSON: It may be, Your Honor, that that  
5 particular statute doesn't authorize the withholding of  
6 information, but there may be other statutes that authorize the  
7 withholding of the information.

8 THE COURT: I hope so.

9 MR. HANSON: That would justify the agency's position.  
10 For example,, as I pointed out today, Rule 45 and Rule 26 would  
11 be other examples that would allow the agency to -- I'm sorry?

12 THE COURT: What are we talking about, the FBI or the  
13 EPA?

14 MR. HANSON: I'm talking about the EPA, Your Honor.

15 THE COURT: Maybe something else that allows the EPA  
16 to do it. It sounds like 301 isn't the statute that does it.

17 MR. HANSON: 301 is not the statute that does what,  
18 Your Honor?

19 THE COURT: Allows them to withhold information.  
20 You're saying there must be some other statute out there that  
21 allows them to withhold the information.

22 MR. HANSON: There could be any number of privileges,  
23 for example, the qualified law enforcement privilege, Your  
24 Honor, or attorney-client privilege.

25 THE COURT: Well, I'm asking you what are you relying

1 on in telling this Court that you've got the authority to  
2 withhold information from the public and Georgia-Pacific?

3 MR. HANSON: We are relying on EPA's lawfully  
4 promulgated Touhy regulations pursuant to the Housekeeping  
5 Statute. Other courts have reviewed EPA's Touhy regulations  
6 and applied them in exactly this kind of setting: Davis,  
7 Boron, Town of Wolfeboro, and have permitted EPA to withhold  
8 deposition testimony when it was not in EPA's interests. In  
9 addition, we are relying on Rule 45 and Rule 26 of the rules of  
10 civil procedure as noted in our last page of our brief. I just  
11 want to make sure we are being clear about that, Your Honor.

12 THE COURT: All right. Those may be appropriate to  
13 use anyway. The Federal Rules of Civil Procedure may be  
14 appropriate.

15 MR. HANSON: Again, Your Honor, that's not our  
16 position. But we would certainly understand the Court, if the  
17 Court applied Rule 45 and 26.

18 THE COURT: Well, the same Congress that drafted 301,  
19 which says you can't withhold information, also drafted or  
20 approved the drafting of 45 and 26. The Supreme Court approved  
21 45 and 26. So that's kind of -- I look at that kind of a  
22 rock. I look at the regulations that EPA drafted as kind of a  
23 beautiful crystalline glass object of some sort; when a glass  
24 object meets a rock or a rock meets a glass object, regardless  
25 of how it happens, the glass object usually doesn't fair too

1 well. Maybe that's a bad analogy.

2 Let's look at the regulations. The other side has  
3 pointed out that the regulations apply to an employee that  
4 receives a subpoena. They say we are not, we are no longer  
5 subpoenaing the employee. 30(b)(6) goes to the, 30(b)(6) goes  
6 to the agency. Now, you've said, all right, that makes our  
7 position stronger because you're asking for our official  
8 position. Well, regardless of that, the regulations don't  
9 appear to apply in that situation. What's your response to the  
10 fact that the regulations don't mention anything about 30(b)(6)  
11 depositions directed to your agency?

12 MR. HANSON: Your Honor.

13 THE COURT: Speak only to employees.

14 MR. HANSON: I think I respond that the agency is made  
15 of employees. It would be an employee who would testify on  
16 behalf of the agency. I'm not sure that we would see that as a  
17 meaningful, a necessarily meaningful distinction. Having said  
18 that, we do recognize that it does refer to employees in the  
19 text of the regulation.

20 THE COURT: You drafted the regulations. They are  
21 your regulations. 30(b)(6) has been on the books for a long  
22 time, and certainly you've had a chance to amend those  
23 regulations to address this situation. There's been litigation  
24 about it. Why wouldn't you address the situation?

25 MR. HANSON: I'm not sure I have an answer to that,

1 Your Honor, except that, again, I don't think that it's, it  
2 would be a meaningful distinction. The effect would be the  
3 same. An EPA witness would have to make themselves available,  
4 prepare for a deposition, and be deposed for a number of days  
5 on topics that we have objected to for a number of reasons.  
6 Whether that person is an individual, or a representative, at  
7 least in the context of the burden, I'm not sure would matter.

8 THE COURT: Well, it's not really the same thing, is  
9 it?

10 MR. HANSON: No, it's not.

11 THE COURT: A deposition of an employee only requires  
12 the employee to testify what he personally knows. And actually  
13 doesn't have to prepare at all. He either knows it or he  
14 doesn't know it. He can prepare, I suppose. It's his personal  
15 knowledge. A 30(b)(6) the witness is testifying on behalf of  
16 the organization. It's the organization testifying, and the  
17 30(b)(6) witness does have to prepare himself to speak on  
18 behalf of the organization and be able to testify as to  
19 everything on the schedule. It's an entirely different  
20 concept.

21 MR. HANSON: I agree with the Court, Your Honor, there  
22 is no dispute there.

23 THE COURT: Wouldn't the regulations really in this  
24 sense they are really addressed to the employee and what  
25 happens when an employee is required to testify about some



1 factual situation in his agency, or produce something in  
2 something, in some aspect of the agency's work that he's been  
3 involved in. And I can understand why you don't want the  
4 employee running off giving a deposition that may be where the  
5 answers may be attributable to the organization. So you have  
6 this clearing house or this centralizing is a better word  
7 perhaps, you go to somebody and, an agency and you get his  
8 clearance or her clearance as to how the employee is supposed  
9 to respond. But that's different than when the 30(b)(6) goes  
10 to the agency itself to get the agency's position. And the  
11 regulations do not appear to apply to that situation. And if  
12 they don't apply to that situation, how can the EPA rely upon  
13 them today?

14 MR. HANSON: I think in part, Your Honor, as I  
15 explained the agency's position is that the effect is  
16 essentially, would essentially be the same. It's an employee  
17 either way. And, if anything, the burden is greater because,  
18 as the Court pointed out, the employee would have to prepare on  
19 the enumerated topics for the deposition. Because, and it's  
20 important, it's the agency's position, it's important for the  
21 witness to be as prepared as reasonably possible. I think  
22 that's why I think it's still appropriate, we would say it's  
23 still appropriate to rely on the Touhy regulations here.

24 THE COURT: All right.

25 MR. HANSON: Unless the Court has any other questions,

1 I will have a seat.

2 THE COURT: Thank you.

3 MR. HANSON: Thank you, Your Honor.

4 MR. PARKER: Your Honor, may I be very briefly heard?

5 THE COURT: Well, I'm going to take role here in the  
6 sense who wants to say anything further. We are approaching  
7 12:00 o'clock, and I do have another matter previously  
8 scheduled. Mr. Fields, do you have comments as well that you  
9 want to offer?

10 MR. FIELDS: I request two minutes or less.

11 THE COURT: Mr. Parker.

12 MR. PARKER: Five minutes or less.

13 THE COURT: And then the motion is brought by  
14 Georgia-Pacific. So they really get the last word here.

15 MR. SHEBELSKIE: Your Honor, no more than five  
16 minutes.

17 THE COURT: All right. I'm afraid because that adds  
18 up to half an hour by the time we get done, we will reconvene  
19 at a little bit after 2:00 o'clock. I have a two-hour meeting  
20 scheduled at 12:00 o'clock. I'm sorry, but I don't think we're  
21 going to get done in the next three minutes, and my meeting is  
22 out of the building at 12:00 o'clock.

23 MR. SHEBELSKIE: Your Honor, I'm willing to waive my  
24 rebuttal argument if the other parties will just so we can, we  
25 have taken a sufficient course of time.

1 THE COURT: Well, I hate to do that to you. You're  
2 entitled to make the arguments. And it's valuable, your  
3 comments are valuable. All right. In deference to counsel,  
4 but I'll hold you to two minutes apiece, two minutes apiece,  
5 three minutes. Is that fair?

6 MR. PARKER: Thank you, Your Honor. I will skip then  
7 Mrs. Parker's instruction that I wish you a happy new year.

8 The only, we take no position on behalf of  
9 International Paper on the propriety of the deposition itself.  
10 The only thing that I would focus the Court's attention on in  
11 less than two minutes is topic number 7 which goes to EPA's  
12 expectations regarding future removal. As counsel for EPA  
13 pointed out, they believe that is privileged and they will have  
14 to object to every question. I think it's appropriate for the  
15 Court to enter a protective order as to that topic, and I would  
16 note, add that not only does it call for privilege, it calls  
17 for speculation. And while Georgia-Pacific has cleverly tried  
18 to word the topic and EPA's present expectations about future  
19 actions, I think if a question were asked that way in a trial  
20 in front of you, you would sustain a speculation objection as  
21 to it. And I think asking the EPA to talk about what it might  
22 or might not do or what it might or might not order at this  
23 site in the future is inappropriate, and, therefore, I would  
24 suggest that the Court exclude topic 7 if in fact it orders  
25 this deposition to go forward. Thank you, Your Honor.

1 THE COURT: Thank you, counsel. Mr. Fields.

2 MR. FIELDS: Good afternoon, Your Honor. NCR likewise  
3 took no position on the motion. If the Court determines to  
4 authorize the deposition, NCR reserves the right and intends to  
5 participate. Not taking a position doesn't mean we are not  
6 interested. I sat here this morning and heard  
7 Georgia-Pacific's counsel say any number of things about either  
8 what NCR's theories of the case is, its positions, its actions,  
9 what it's said and done. I'm not going to waste your time here  
10 rebutting. I decline to adopt his summary of any aspect of  
11 NCR. We will have another day in court and NCR can speak for  
12 itself at that time.

13 THE COURT: That's fine. I assumed you had a  
14 responsive position, and I'm not litigating what the  
15 allegations are between the two of you quite honestly.

16 MR. FIELDS: And it's not germane to what your ruling  
17 is. I'll speak my piece in that regard. Last but not least,  
18 there wasn't a handout given to everybody. There wasn't enough  
19 copies for everybody. I make a request on the record that NCR  
20 get a true and complete copy of the handout so that I have it  
21 for my file. And with that I'll sit down.

22 THE COURT: Can we do that, counsel?

23 MR. SHEBELSKIE: I think we can do that. And I  
24 apologize. I thought I had six copies. I miscounted.

25 MR. PARKER: We have been sharing nicely, Your Honor.

1 THE COURT: How many copies are we short?

2 MR. SHEBELSKIE: Just one.

3 THE COURT: We have one extra for the clerk. We don't  
4 need that. We will take care of this right now.

5 MR. FIELDS: Thank you.

6 THE COURT: All right. That matter is taken care of.  
7 Thank you.

8 MR. SHEBELSKIE: Three quick points, Your Honor.  
9 There was colloquy about the standard of review that  
10 Judge Borman used in Packaged Ice Antitrust litigation case,  
11 and he applied the Rule 45 standard. He went through it, the  
12 analysis, and found, and I read here, "The Court finds that the  
13 federal discovery rules, including Rule 45 and 26(b), along  
14 with the applicable privilege rules, provide sufficient "tools"  
15 with which this Court can adequately protect both the  
16 litigant's right to receive evidence and the government's  
17 interest in protecting both its processes and its resources.  
18 Accordingly, the Court will consider whether or not, under Rule  
19 45, the subpoena calls for privileged matter or whether  
20 production would cause an undue burden." And that was the In  
21 re Packaged Ice litigation case that then Judge Scoville  
22 analyzed, found persuasive and consistent with the Sixth  
23 Circuit's decree that agencies cannot by regulation override  
24 the Federal Rules of Civil Procedure.

25 The second point, Your Honor, I would make is

1 listening to EPA's counsel, if what he says is true about the  
2 various topics, then this will be a short deposition. If, for  
3 example, on the time critical removal actions EPA's witnesses  
4 are going to say, there was nothing untoward here, our reasons  
5 are those stated in the administrative record, we have no  
6 further, there was nothing improper or any sort of collusion  
7 with Georgia-Pacific, then it's a short, crisp series of  
8 questions. Likewise, for all the topics.

9 And in particular for topic 7 that Mr. Parker also  
10 addressed, Your Honor, it wouldn't be appropriate to preclude  
11 that because we heard actually from EPA's counsel this morning  
12 precisely the type of testimony we need from EPA. He candidly  
13 admitted EPA is still working away. There's work ongoing right  
14 now as we speak. Back in Chicago or Washington, people at EPA  
15 are undertaking analyses and making decisions and assessments;  
16 there will be ongoing monitor work. So in fact even the  
17 factual representations that we received here today would be  
18 sufficient to establish the minimal jurisdictional threshold we  
19 need to establish that there would be future work done that  
20 Georgia-Pacific could be responsible for. So again, these are  
21 matters of fact. Be very quick. This deposition will not be  
22 burdensome.

23 And finally, Your Honor, is that even if the arbitrary  
24 and capricious standard were to apply here I think you would  
25 have to order the deposition to go forward. Because quite

1 manifest now that the EPA's decision is arbitrary and  
2 capricious, even under the APA. They are relying, they have  
3 made clear today, on a regulation as the basis for their  
4 refusal to comply with the subpoena. Even though that  
5 regulation on its face does not apply to 30(b)(6) depositions,  
6 even though that regulation on its face doesn't say that the  
7 agency will and can withhold deposition testimony in response  
8 to a 30(b)(6) notice, and as importantly, that regulation is  
9 based on a statute that doesn't allow them to withhold  
10 information. It is clearly arbitrary and capricious to rely on  
11 an erroneous legal proposition, namely the Touhy regulations,  
12 as something that doesn't give them the authority for the  
13 decision. Conversely, they acted arbitrarily and capriciously  
14 by not considering and taking into account the rules, the  
15 bedrock principle embodied in the Rules of Civil Procedure that  
16 every party is entitled to every man's evidence and testimony.  
17 And they haven't weighed that as part of the public interest  
18 here for this very important case.

19 Thank you, Your Honor.

20 THE COURT: Thank you. Well, I don't have time to  
21 rule from the bench, and I'm not 100 percent certain how I'm  
22 going to rule. I think I know how I'm going to rule. I would  
23 prefer to rule from the bench because it's easier than it is to  
24 draft an opinion.

25 There are some situations where a party might be well

1       advised not to resist a subpoena. I know the EPA does not want  
2       to open the door to more subpoenas down the road in such cases.  
3       On the other hand, what you risk if you lose this motion and  
4       you appeal it, and I for some reason should be upheld, which  
5       has been known to happen, is that you get some bad law as far  
6       as you're concerned. And is it really worth it. Or it's going  
7       to be a relatively short, and probably not that inconvenient  
8       deposition which will be precedent for nothing down the road in  
9       other litigation.

10               So is it really a battle that you want to fight. I  
11       haven't studied Scoville's, Judge Scoville's opinion that  
12       carefully. And perhaps he did rule incorrectly. He was only  
13       here as a judge for 28 years before he retired recently. He  
14       had a good reputation. He was a straight A. student in college  
15       and law school. But then we found out that actually -- he  
16       attended the University of Michigan Law School -- he did get  
17       one class where he did not get an A. He got an A. in most of  
18       his classes. So we did have to let him go. If that undermines  
19       his opinion.

20               Judge Borman, well, he is an Article III judge so I  
21       won't comment on him. But certainly seems to be a nice guy  
22       every time I have met him, fairly bright. Their decisions  
23       would probably be ones that I would quote if I upheld the, that  
24       motion. And this Court has been known to rule against federal  
25       agencies and been upheld at the Sixth Circuit. That may or may



1 not be something that you want to have happen because the  
2 batting average of the Sixth Circuit is -- well, if I want to  
3 be upheld at the Sixth Circuit I'm not going to say anything  
4 more.

5 But I just wonder if this is a battle you really want  
6 to fight, if you want to get another opinion on the record. On  
7 the other hand, you may well prevail. So you have between now  
8 and the time I write the opinion to decide if you want to  
9 continue to pursue this. I assume you're going to continue to  
10 pursue it so I'm going to go ahead and write an opinion.

11 MR. HANSON: Your Honor, may I respond to that?

12 THE COURT: Of course you can.

13 MR. HANSON: Thank you. I candidly, we learned a lot  
14 of information today about why these topics are important to  
15 Georgia-Pacific that we hadn't heard before. And candidly,  
16 Your Honor, I did my best during the argument but I have  
17 learned some new information, and I would be grateful if I  
18 could have sometime to talk to counsel for Georgia-Pacific  
19 about the deposition and perhaps come to an accommodation and  
20 produce a witness.

21 THE COURT: Well, I leave for London tomorrow morning.  
22 And I can assure you that between now and tomorrow morning I'm  
23 not going to look at this file.

24 And be there for a week and when I come back there  
25 will probably be something else on my desk so it will be just a

1       little while before I get to this. Will that give you enough  
2       time?

3               MR. HANSON: That is more than enough time.

4               MR. PARKER: Enjoy your trip, Your Honor.

5               THE CLERK: All rise, please. Court is adjourned.

6               (Proceedings concluded, 12:10 p.m.)  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

## C E R T I F I C A T E

I certify that the foregoing is a transcript from the Liberty Court Recording System digital recording of the proceedings in the above-entitled matter to the best of my ability.

/s/ Kathy J. Anderson

Kathy J. Anderson, RPR, FCRR

U.S. District Court Reporter

402 Federal Building

Grand Rapids, MI 49503

**KATHY J. ANDERSON, U.S. DISTRICT COURT REPORTER**